No. 17-368

In The Supreme Court of the United States

SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT,

Petitioner,

v.

SOLARCITY CORPORATION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMERICAN PUBLIC POWER ASSOCIATION AND LARGE PUBLIC POWER COUNCIL AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

The American Public Power Association ("APPA") is the service organization representing the interests of not-for-profit, public power utilities throughout the United States. More than 2,000 public power utilities, doing business in every state except Hawaii, provide electric service to approximately 49 million consumers, or about 15 percent of the nation's electric customers.

The Large Public Power Council ("LPPC") is an organization of twenty-six of the nation's largest public power systems.[2] The member utilities are locally governed and directly accountable to consumers. They provide electricity across twelve states, from Washington State to Florida, and from Arizona to New York, as well as the island of Puerto Rico. LPPC member utilities provide low-cost power to more than 30 million people – about 10 percent of the U.S. population. Collectively, LPPC member utilities own and operate more than 71,000 megawatts of generation capacity and over 30,000 circuit miles of high-voltage transmission lines.

APPA, LPPC, and their members have a strong interest in the scope of state-action immunity, including the immediate appealability of its denial. APPA and LPPC represent not-for-profit, public power utilities.

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[1] Pursuant to Rule 37.6, APPA and LPPC (*"amici"*) affirm that no counsel for a party authored this brief in whole or in part, and that no person other than *amici* made a monetary contribution intended to fund the preparation or submission of this brief. All parties consent to the filing of this brief.

[2] Each LPPC member is also a member of APPA.

These entities are either departments of city or town governments, or are special purpose governmental entities. They provide power, and in many cases water and other public services, to millions of Americans. They are run by elected or appointed public servants. They serve public goals set forth by the states in which they operate. In the areas served by public power utilities, states have decided to displace a for-profit competitive marketplace that federal antitrust laws are designed to regulate and instead to provide low-cost, reliable, and essential services to citizens through these governmental entities.

State-action immunity respects the decision of sovereign states to delegate to these entities the power to take certain actions free of the burden of the antitrust laws. State-action immunity protects public power utilities' ability to meet their public goals, and provide myriad public services. Ensuring that public power utilities can immediately appeal an adverse decision on state-action immunity helps protect these entities' ability to provide low-cost utility services without disruption, and insulates their public leaders' discretion to make reasonable policy decisions and avoid the costs and distractions of protracted litigation.

SUMMARY OF THE ARGUMENT

APPA and LPPC urge the Court to reverse the Ninth Circuit's refusal to treat state-action immunity like similar immunities grounded in state sovereignty for purposes of interlocutory appeal. The question – when a decision withholding state-action immunity for public entities may be appealed – directly impacts APPA and LPPC members and will indirectly affect the public by virtue of the unique role that APPA and LPPC members play in the community.

APPA and LPPC members (also referred to as "public power utilities"[3]) are governmental entities that provide power and other public services to 49 million Americans – services like electricity and water that are essential to everyday life. They advance public-oriented goals that distinguish them from for-profit entities. In light of those public objectives, it is critical that this Court permit public power utilities to be able to appeal an adverse decision on state-action immunity right away, and not bar their ability to appeal until after a trial can be conducted and the district court's judgment on the merits can be issued.

Treating state-action immunity as immediately appealable respects the sovereignty of state governments, which have delegated authority to public power

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[3] Public power utilities are "not-for-profit electric utilities that are owned, controlled, and operated by state or local governments, primarily by municipalities, for the benefit of their own citizens." Alan Richardson & John Kelly, *The Relevance and Importance of Public Power in the United States*, 19 Nat. Resources & Env't 54, 54 (2005).

utilities to administer important services. It also avoids negative practical consequences, such as unnecessary and significant litigation costs for what are often small governmental entities, and a deleterious effect on public power utilities' public-servant leaders. Forcing public power utilities to litigate antitrust claims before appellate review of adverse decisions on state-action immunity will undermine the purpose of the doctrine and hamper public power utilities' ability to meet their public objectives.

ARGUMENT

I. PUBLIC POWER UTILITIES SERVE PUBLIC OBJECTIVES AND PROVIDE CRITICAL SERVICES.

State-action immunity allows states to favor public objectives over free-market competition. This Court established the doctrine of state-action immunity in *Parker v. Brown*, 317 U.S. 341 (1943), holding that federal antitrust law does not bar states from engaging in allegedly anti-competitive conduct "as an act of government." *Id.* at 325. This doctrine arises out of "the federalism principle that the States possess a significant measure of sovereignty under our Constitution." *Cmty. Commc'ns Co. v. City of Boulder, Colo.*, 455 U.S. 40, 53 (1982). The doctrine allows states in certain "spheres" to "impose restrictions on occupations, confer exclusive or shared rights to dominate a market, or otherwise limit competition to achieve public objectives." *N.C. State Bd. of Dental Examiners v. F.T.C.*, 135 S. Ct. 1101,

1109 (2015). In recognizing the doctrine, this Court acknowledged the impropriety of forcing states to conform each of their laws and policies "to the mandates of the Sherman Act," noting that doing so would "impose an impermissible burden on the States' power to regulate." *Id.* This doctrine applies not just to states themselves, but to local governmental entities when they "act[] pursuant to a clearly articulated and affirmatively expressed state policy to displace competition." *F.T.C. v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 219 (2013).

The advent of public power pre-dated *Parker v. Brown* and the Sherman Act itself. Alan Richardson & John Kelly, *The Relevance and Importance of Public Power in the United States*, 19 Nat. Resources & Env't 54, 54 (2005) (describing the first examples in the United States of public power utilities in 1880). Courts have applied the state-action immunity doctrine to public power utilities. *See Grason Elec. Co. v. Sacramento Mun. Util. Dist.*, 770 F.2d 833, 838 (9th Cir. 1985) (concluding that the public power utility serving the Sacramento, California area was "immune from antitrust liability based on the state action immunity doctrine"). Indeed, nowhere is this doctrine's aim to "achieve public objectives," *N.C. State Bd. of Dental Examiners*, 135 S. Ct. at 1109, more relevant than in the work of public power utilities. *See Lancaster Cmty. Hosp. v. Antelope Valley Hosp. Dist.*, 940 F.2d 397, 401-02 (9th Cir. 1991) (listing examples of state action immunity granted to public utilities to show that the court has "been more willing to find that a statute

displaces competition with regulation if the statute concerns a utility"). The question of whether state-action immunity bars suit against public power utilities and the timing of appellate review is crucial to APPA and LPPC members – and the communities they serve – because of the public objectives that guide them and the critical public services they provide.

A. Public power utilities are governmental entities that serve a public purpose.

State-action immunity allows public power utilities to focus on "public objectives," *N.C. State Bd. of Dental Examiners*, 135 S. Ct. at 1109, and APPA and LPPC members have many. APPA members vary in size from large providers – such as the Los Angeles Department of Water & Power in Los Angeles, California – to small entities – like Madison Electric in Madison, Maine. *See* Our Members, Am. Pub. Power Ass'n (2017), https://www.publicpower.org/our-members. Twenty-six of the largest public power systems make up the membership of LPPC. *See* Our Members, Large Pub. Power Council (2017), http://www.lppc.org/who-we-are/our-members.

Public power utilities are one of the four primary types of electric utilities in the United States. The other three are investor-owned utilities (i.e., large, for-profit companies), electrical cooperatives, and federal power entities. *See, e.g.*, John E. Kwoka, Jr., *Governance Alternatives & Pricing in the U.S. Electric Power Industry*, 18 J.L. Econ. & Org. 278, 278-79 (2002).

Public power utilities serve roughly 15 percent of the nation's electricity customers. Stats and Facts, Am. Pub. Power Ass'n (2017), https://www.publicpower.org/public-power/stats-and-facts.

The public power utilities that are members of APPA and LPPC are either departments of city or town governments, or are special purpose governmental entities created or commanded by state or municipal law to provide utility services. Public Power, Am. Pub. Power Ass'n (2017), https://www.publicpower.org/public-power ("Like public schools and libraries, public power utilities are owned by the community and run as a division of local government."); *see also Jordan v. Zidel*, 191 A.2d 178, 180 (N.J. 1963) (stating that it is clear that a municipal utility's authority "is but a means of discharging local governmental responsibilities for the welfare of inhabitants of the community"); Richardson & Kelly, *The Relevance and Importance of Public Power in the United States*, at 54 (public power utilities are "not-for-profit electric utilities that are owned, controlled, and operated by state or local governments, primarily by municipalities, for the benefit of their own citizens").

By their very nature, these governmental entities serve public objectives beyond the Sherman Act's reach. *See Parker*, 317 U.S. at 351 (noting that the purpose of the Sherman Antitrust Act "was to suppress combinations to restrain competition and attempts to monopolize by *individuals and corporations*" (emphasis added)). Their history is different. Public power utilities were developed not to maximize profits or

compete for customers, but to provide electricity service to people who needed it.[4] Public power utilities aimed to expand electrification to rural areas in particular, regions of the country that private, for-profit utilities left unserved. Richard Rudolph & Scott Ridley, *Power Struggle: The Hundred-Year War over Electricity* 37-38 (1986).

By 1917, utility-generated electricity was available to only slightly more than 60 percent of the United States population. Because private utilities had largely neglected rural areas, electricity was rarely available to rural residents. William J. Hausman & John L. Neufeld, *How Politics, Economics, & Institutions Shaped Electric Utility Regulation in The United States: 1879-2009*, 53 Bus. Hist. 723, 726, 733 (2011). With support from President Franklin D. Roosevelt's New Deal, electric utility service reached close to 84 percent of the population by 1940, thanks in part to the work of public power utilities to expand access. *Id.*; Twentieth Century Fund, Electric Power and Government Policy 3 (1947).

The public-oriented nature of these governmental utilities is also borne out in the amount of revenue they generate and how they use it. Because public power

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[4] In places like California and Arizona, some public power utilities started by offering water, and only later offered electricity. *See Pac. Gas & Elec. Co. v. Sacramento Mun. Util. Dist.*, 92 F.2d 365, 368 (9th Cir. 1937) (noting that public utilities providing electricity had "become as interwoven in the lives of California men and women as . . . the function of supplying them with domestic water").

utilities do not have shareholders, none of the utility revenues need to be devoted to paying dividends or otherwise distributing profit to equity investors. Kwoka, Jr., *Governance Alternatives & Pricing in the U.S. Electric Power Industry*, at 280 (noting that, unlike public power utilities, private, investor-owned utilities are "ultimately responsible to . . . shareholders and therefore should pursue profit maximization"). They are also democratically governed, by public servants who are either appointed or elected and, in the latter case, are directly accountable to the public. *Id.* at 279-81. The cost-based rates charged by public power utilities are often lower than those charged by investor-owned utilities. *Id.* at 278-94 (subjecting U.S. electricity rates to a comprehensive pricing model and controlling for other factors, and concluding that public ownership of utilities is associated with lower utility rates); *see also* Public Power, Am. Pub. Power Ass'n (2017), https://www.publicpower.org/public-power ("Homes powered by public power utilities pay nearly 15 percent less than homes powered by private utilities."). And scholars argue that the evidence shows that this reduction in price is not simply a coincidence; it is directly related to the different way in which public power utilities – in particular those with elected leaders – are governed. *See* Kwoka, Jr., *Governance Alternatives & Pricing in the U.S. Electric Power Industry*, at 293 ("[T]his study makes clear that characteristics of governance structures and operations that expose decision makers to greater popular pressure and that make them more accountable generally serve to reduce prices.").

In addition to providing low-cost electricity service, public power utilities often make important contributions to other governmental functions in their communities. In 2014, for example, public power utilities "contributed 5.6 percent of [their] electric operating revenues back to the communities they serve." Public Power Pays Back at 3, Am. Pub. Power Ass'n (Apr. 2016) (hereinafter Public Power Pays Back), http://appanet.files.cms-plus.com//PDFs/PublicPowerPaysBack2014.pdf; *see also* Richardson & Kelly, *The Relevance and Importance of Public Power in the United States*, at 58 (noting that public power utilities make significant payments in lieu of taxes to state and local governments, which are similar in amount to the taxes paid by private, investor-owned utilities). This revenue contribution comes in a variety of forms, from discounted services, to general payments to the local government, to taxes. Examples of how public power utilities use this revenue for the public good include additional streetlighting; lighting for municipal buildings; traffic signals; and recreational facilities. Public Power Pays Back at 7-8. The utility owned by the City of Anoka, Minnesota, for example, generates $25 million in revenue each year, and roughly 10 percent of that revenue is directed back to boost the city's operating funds. Anoka Mun. Util., http://www.anokaelectric.govoffice3.com/ (last visited Jan. 18, 2018). In short, public power utilities are distinct from private enterprise because of the public objectives that govern them, their history, the rates they charge, and how they use any net operating revenue.

B. Public power utilities provide critical public services.

Not only do public power utilities – at a general level – embody the state-articulated "public objectives" that state-action immunity is meant to protect, *N.C. State Bd. of Dental Examiners*, 135 S. Ct. at 1109, they also provide essential services to which the public should have stable and reliable access. Different from the products and services that make up most of what American private industry offers, electricity services are uniquely essential to everyday life and are, consequently, "affected with a public interest." 16 U.S.C. § 824(a) (stating, in Section 201 of the Federal Power Act, the public nature of electricity services); *see also Grason Elec. Co.*, 770 F.2d at 837-38 (noting that the California Constitution allows for the creation of municipal utilities to perform specifically public functions: "*public* works to furnish [a municipality's] inhabitants with light, water, power, heat, transportation or means of communication" (emphasis added)); *State v. City of Austin*, 331 S.W.2d 737, 745 (Tex. 1960) ("Utilities are necessary adjuncts of the public welfare. Their business operations and their property have long been subject to special legislative treatment for many years." (internal quotation marks omitted)).

Public power utilities provide, first and foremost, essential electricity service. Fully 49 million Americans – some 1 in 7 electricity customers – receive their power from public power utilities. In the post-industrial era, defined by appliances, computers, the internet, and cellphones, it is difficult to overstate how

important electricity is to modern life. *See* Lois R. Lupica, *Transitional Losses in the Electric Power Market: A Challenge to the Premises Underlying the Arguments for Compensation*, 52 Rutgers L. Rev. 649, 652 n.6 (2000) ("Electricity is of critical importance in our culture. Electricity is a necessity and there is no close substitute for most of the product provided."). Natural disasters that temporarily eliminate electricity service also show how critical reliable electricity service is to our emergency management systems and public health.

A number of public power utilities also provide domestic water service. A single LPPC/APPA member – the Los Angeles Department of Water & Power – provides water to over 4 million people, through 681,000 active service connections. Water: Facts & Figures, L.A. Dep't of Water & Power, https://www.ladwp.com/ladwp/faces/ladwp/aboutus/a-water/a-w-factandfigures?_adf.ctrl-state=1br8pf1ntd_4&_afrLoop=1054280876754233 (last visited Jan. 18, 2018). These utility services are "essential to the protection of [the public's] health and safety." *City of Austin*, 331 S.W.2d at 745. And again, as recent natural disasters have demonstrated, without access to dependable clean water, communities struggle.

Some public power utilities also provide other important services, such as wastewater, trash removal, street lighting, street maintenance, gas, and broadband. Owatonna Public Utilities in Minnesota, for example, provides wastewater, natural gas, and streetlighting services, in addition to electricity and water. Owatonna Pub. Utils., http://www.owatonna

utilities.com/ (last visited Jan. 18, 2018). The Coldwater Board of Public Utilities in Michigan provides electricity, water, wastewater, and broadband services (including cable, internet, and phone). Our Services, Coldwater Bd. of Pub. Utils., http://www.coldwater.org/415/Our-Services (last visited Jan. 18, 2018). Hastings Utilities in Nebraska offers electricity, water, natural gas, and wastewater services, and conducts maintenance on street lighting. Rates, Hastings Utils., https://www.hastingsutilities.com/rates/ (last visited Jan. 18, 2018). Idaho Falls Power offers a wide range of services, including electricity, water, trash removal/sanitation, and wastewater. Stop, Start, Move Service, Idaho Falls Power, https://www.idahofalls idaho.gov/268/Stop-Start-Move-Service (last visited Jan. 18, 2018). Bryan Municipal Utilities in Ohio even installs and maintains security lights on existing utility poles for a small monthly fee. Security Lighting, Bryan Mun. Utils., https://www.cityofbryan.net/security-lighting/ (last visited Jan. 18, 2018). Either state government, or the public power utilities themselves – and not the whims of investor demand – determines the services these entities provide to citizens.

State-action immunity's aim of allowing government to engage in allegedly anti-competitive conduct to advance public objectives, *N.C. State Bd. of Dental Examiners*, 135 S. Ct. at 1109, aligns with states' authorization of public power utilities to provide these essential services. In many parts of the country, where potential profit did not warrant private industry offering these services, state and municipal governments

have acted to ensure that these services are available. State-action immunity protects those decisions from undue intervention under the banner of federal antitrust litigation.

II. BARRING STATE-ACTION IMMUNITY APPEALS UNTIL THE END OF TRIAL COURT LITIGATION UNDERMINES THE IMMUNITY'S PURPOSE AND CREATES NEGATIVE CONSEQUENCES FOR THE PUBLIC.

A final determination on the applicability of state-action immunity to a public power utility defendant should be made at the outset of litigation. Requiring public power utilities to respond to discovery and defend themselves in full-blown trials on antitrust claims before allowing appeal of an adverse trial court decision on state-action immunity questions will undermine the doctrine's purpose and cause negative consequences for public power utilities and the communities they serve.

A. Barring immediate appeal here undermines state-action immunity's purpose of resolving conflicts between federalism and antitrust principles.

State-action immunity's purpose is to "resolve conflicts that may arise between principles of federalism and the goal of the antitrust laws, unfettered competition in the marketplace." *S. Motor Carriers Rate*

Conference, Inc. v. United States, 471 U.S. 48, 61 (1985). The doctrine respects the "significant measure of sovereignty" afforded states "under our Constitution." *Cmty. Commc'ns Co.*, 455 U.S. at 53. If public power utilities – which have been created by sovereign states and delegated authority to provide public services – are forced to litigate antitrust cases to final judgment before being able to appeal an adverse decision regarding state-action immunity, then the doctrine's goal of acknowledging and respecting state sovereignty is not being met.

In the case of public power utilities, states have made an important choice, that is, to delegate authority to political subdivisions to achieve public goals by providing utility services in the geographic regions they serve. As this Court noted in *City of Trenton v. State of New Jersey*, 262 U.S. 182, 186 (1923), when discussing the state's decision to provide water: "Power to own, maintain, and operate public utilities, such as waterworks, gas and electric plants, street railway systems, public markets, and the like is frequently conferred by the states upon their cities and other political subdivisions." *See also City of Columbus v. Ours Garage and Wrecker Service, Inc.*, 536 U.S. 424, 437 (2002) ("The principle is well settled that local governmental units are created as convenient agencies for exercising such of the governmental powers of the State." (internal quotation marks omitted)). Across the country, thousands of public power utilities exercise delegated state authority to administer services that are essential to daily human life. States have made this

type of delegation to ensure these services are provided in a stable, reliable, and efficient manner, at a reasonable cost, especially where private providers may not be inclined to serve. *See Big Country Foods, Inc. v. Bd. of Educ. of Anchorage School Dist., Anchorage, Alaska*, 952 F.2d 1173, 1179 (9th Cir. 1992) ("A state should not be penalized for exercising its power through smaller, localized units; local control fosters both administrative efficiency and democratic governance.").

This choice on the part of states demands respect under our dual system of governance, and under the state-action immunity doctrine that is designed to respect state sovereignty. *Cmty. Commc'ns Co.*, 455 U.S. at 53. Hauling public power utilities and their officers into court, and forcing them to litigate complex and expensive antitrust cases for years before they can obtain appellate review of a determination that state-action immunity does not apply, affords no such respect. *See Martin v. Mem'l Hosp. at Gulfport*, 86 F.3d 1391, 1395 (5th Cir. 1996) ("One of the primary justifications of state action immunity is the same as that of Eleventh Amendment immunity – to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties." (internal quotation marks omitted)); *see also Preferred Commc'ns, Inc. v. City of Los Angeles*, 754 F.2d 1396, 1413-14 (9th Cir. 1985) (stating that if the state-action immunity doctrine were unavailable absent "[n]arrowly drawn, explicit delegation" of legislative authorization to municipalities, then "the specter of antitrust liability would unduly hamper the state's ability to

allocate governmental authority between itself and its subdivisions"). It undermines a state's choice regarding these essential services, and it effectively neuters the protections state-action immunity is meant to provide.

B. Delay will have negative consequences for public power utilities, and the public.

It is critical that public power utilities be able to resolve the application of state-action immunity at an early stage in litigation because of the practical impact of doing otherwise. Public power utilities are "not-for-profit electric utilities that are owned, controlled, and operated by state or local governments, primarily by municipalities, for the benefit of their own citizens." Richardson & Kelly, *The Relevance and Importance of Public Power in the United States*, at 54; *see also* Public Power, Am. Pub. Power Ass'n (2017), https://www.publicpower.org/public-power. What little net operating revenue they may have is re-directed to their authorizing governmental units, or to their customers in the form of lower-cost services. Public Power Pays Back at 3; *see also* Richardson & Kelly, *The Relevance and Importance of Public Power in the United States*, at 58 (noting the significant payments in lieu of taxes that public power utilities make to state or local governments). The significant costs of defending a full trial on antitrust claims would be borne entirely by the citizens these public power utilities serve.

For public power utilities, costly litigation will necessarily draw resources away from the public services these utilities provide. *See* Mike Maciag, *From Police Shootings to Playground Injuries, Lawsuits Drain Cities' Budgets*, Governing (Nov. 2016), *available at* http://www.governing.com/topics/finance/gov-government-lawsuits-settlements.html (stating that the cost of fighting claims in court can lead cities to settlement, and arguing that litigation costs will make up a higher percentage of cities' budgets in years to come); Roger L. Kemp, Managing America's Cities: A Handbook for Local Government Productivity 102 (2007) (noting the tendency of local governments to settle lawsuits due to the significant cost of continuing litigation through trial, regardless of the legal merits of the case). Forcing these entities to litigate to the end of a case before determining if state-action immunity applies will waste significant resources, and ultimately hurt utility customers.

This is especially true in the context of antitrust litigation. As this Court recognized in *Bell Atlantic Corp. v. Twombly*, "proceeding to antitrust discovery can be expensive." 550 U.S. 544, 558 (2007). In support, this Court cited the discussion of "the unusually high cost of discovery in antitrust cases" described in William H. Wagener, Note, *Modeling the Effect of One-Way Fee Shifting on Discovery Abuse in Private Antitrust Litigation*, 78 N.Y.U. L. Rev. 1887, 1898-1899 (2003). *Twombly*, 550 U.S. at 558. Even when dissenting in *Twombly*, Justice Stevens, who arrived at the Court as

an authority on antitrust litigation[6] acknowledged that "[p]rivate antitrust litigation can be enormously expensive[.]" *Twombly*, 550 U.S. at 573 (Stevens, J., dissenting); *see also Robert F. Booth Trust v. Crowley*, 687 F.3d 314, 317 (7th Cir. 2012) ("Antitrust suits are notoriously costly."); *In re Travel Agent Comm'n Antitrust Litig.*, 583 F.3d 896, 904 (6th Cir. 2009) (noting the "dilemma of the extensive litigation costs associated with prosecuting and defending antitrust lawsuits"); *Am. Steel Erectors, Inc. v. Local Union No. 7, Int'l Ass'n of Bridge, Structural, Ornamental & Reinforcing Iron Workers*, 536 F.3d 68, 77 n.7 (1st Cir. 2008) ("[A]ntitrust suits ordinarily entail massive discovery and are expensive to defend."). Antitrust litigation is routinely cited as one of the most complex and expensive types of litigation in the United States. *See* Manual for Complex Litigation, Fourth § 30, p. 519 (2004) (cited in *Twombly*, 550 U.S. at 559); William Kolasky, *Antitrust Litigation: What's Changed in Twenty-Five Years*, 27 Antitrust (Fall 2012) (noting the increasingly burdensome costs of e-discovery in antitrust litigation). These high antitrust litigation costs exacerbate the problem of forcing public power utilities to reach the end of trial court litigation before allowing appellate court review on the question of whether state-action immunity should have saved them from suit in the first instance.

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[6] "Justice Stevens was a prominent antitrust practitioner, lecturer and author before he was even Justice Stevens." Robert A. Skitol and Kennedy M. Vorrasi, *Justice Stevens' Antitrust Legacy*, 24 Antitrust No. 3, at 33 (Summer 2010).

The absence of interlocutory appellate jurisdiction to review and reverse denials of state-action immunity has imposed considerable hardship on defendants that were actually entitled to the immunity. For example, in 1988, the Tenth Circuit held, following final judgment, that an electric utility was entitled to state-action immunity. *Lease Lights, Inc. v. Pub. Serv. Co. of Okla.*, 849 F.2d 1330, 1331 (10th Cir. 1988).[6] The lawsuit had been filed eleven years earlier, in 1977. *Id.* at 1332. Four years into the case, the immune defendant won the first trial on grounds that were vacated, then lost the second trial seven years into the case. *Id.* In April 2001, in another antitrust suit arising in the electric utility context, the Tenth Circuit ruled that an antitrust suit should have been dismissed under the state-action doctrine. *Trigen-Okla. City Energy Corp. v. Oklahoma Gas & Elec. Co.*, 244 F.3d 1220, 1224-25 (10th Cir. 2001) ("[T]he state action doctrine mandates the dismissal of the federal antitrust claims. . . ."). This ruling occurred nearly six years after the suit was filed (in September 1996), *id.* at 1224, and over two years after the immune defendant was on the receiving end of a plaintiff's judgment, *id.* By contrast, in a case where the district court certified its denial of state-action immunity for

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[6] In *Lease Lights* and in *Trigen-Oklahoma City Energy Corp.*, the defendants that ultimately received state-action immunity were not public entities but private ones acting subject to state regulation. However, the cases are meaningful because they demonstrate how the absence of a right of interlocutory review can force a defendant that is entitled to state-action immunity to defend itself for many years, before it can ultimately vindicate itself based on the immunity.

interlocutory appeal under 28 U.S.C. Section 1292(b), the appellate decision enforcing the immunity was issued the year following the district court's decision. *See Grason Elec. Co.*, 770 F.2d at 835-38.[7]

The burden of litigating an entire antitrust case would be especially acute and overwhelming for the many public power utilities that are small organizations providing services to small cities and towns. The majority of APPA members provide power and other services to small communities, yet nevertheless face the specter of antitrust litigation like this case. *See* Public Power, Am. Pub. Power Ass'n (2017), https://www.publicpower.org/public-power ("Most public power utilities have fewer than 4,000 customers. . . ."). Specifically, two-thirds of APPA members serve communities with 4,000 or less customers, and within that group, half serve communities with less than 1,000 customers. *See* Am. Pub. Power Ass'n, 2016-17 Annual Directory & Statistical Report 63 (2017). And public power utilities with the least annual revenue, on average, provide a greater percentage of that revenue back to the smaller communities they serve as payments and contributions. Public Power Pays Back at 4. The

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[7] Outside of the utility context, the Eleventh Circuit (which recognizes a right of interlocutory appeal from denials of state-action immunity) reversed a denial of the immunity fourteen months after the suit was filed. *See Danner Const. Co. v. Hillsborough Cty.*, No. 8:09-CV-650-T-17TBM, 2009 WL 2144716, at *1 (M.D. Fla. July 15, 2009) (noting the suit was filed April 7, 2009), *rev'd and remanded sub nom. Danner Const. Co. v. Hillsborough Cty., Fla.*, 608 F.3d 809 (11th Cir. 2010) (reversing the denial of state-action immunity, on June 9, 2010).

difference between litigating to the end of a case at the trial court level, versus appealing immediately to obtain the protection of state-action immunity, could have an especially significant impact on small public power utilities and the customers and communities they serve.

The burden of unnecessarily litigating to the end of a case before determining that state-action immunity applies also could discourage public service in the governance and management of public power utilities. Some public power utilities have elected governing boards, such as petitioner here and the municipal utility district in *Northwest Austin Municipal Utility District No. One v. Holder*, 557 U.S. 193, 196 (2009), while the leaders of others are appointed by elected officials, such as the municipally-owned utility in *Johnson v. Princeton Public Utilities Commission*, 899 N.W.2d 860, 867 (Minn. Ct. App. 2017). *See, e.g.*, Ames Iowa Municipal Code § 28.701(3) (providing for appointment of public power utility board members by mayor with approval of city council); Redding California Code of Ordinances § 14.22.170(A) (stating that city council establishes electric utility rates); *see also* 2015 Governance Survey at 1-2, Am. Pub. Power Ass'n (May 2015), https://www.csu.org/CSUDocuments/appagovernancesurvey2015.pdf (noting that a majority of surveyed public power utilities are governed by elected city councils, and that the remainder are governed by independent boards, which can be either elected or appointed). The citizen-governance model is important because, in practical terms, enforcement of state-action

immunity rescues certain defendants who are caught between a rock and a hard place. Such defendants were responsible for carrying out a "clearly expressed state policy," *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 40-41 (1985), yet they are being sued because their authorized conduct was allegedly anticompetitive. If a district court fails to apply the immunity under those circumstances, and the court of appeals is unable to review that decision until all district court proceedings end, that experience could have a chilling effect on the willingness of citizen-volunteers to continue their public service.

Even for those that are not deterred from serving, the weight and distraction of lengthy antitrust litigation will, at a minimum, impact the policy-making decisions of public power utilities' leaders. As the article on antitrust litigation cited by this Court in *Twombly* explains, "[a]necdotal evidence suggests that defendants unable to shift the costs of complying with requests for electronic documents feel pressured to settle lawsuits to avoid the discovery costs." Wagener, *supra*, at 1898; *see also* Brian T. Fitzpatrick, *Twombly and Iqbal Reconsidered*, 87 Notre Dame L. Rev. 1621, 1638-41 (2012) (noting that, even for large corporate defendants, the threat of the costs associated with extensive discovery often force pre-discovery settlement). Instead of exercising the discretion and authority delegated to them by the relevant state, and providing services in a way that achieves public goals, public power utility leaders may make defensive decisions

that protect against the added burdens of antitrust litigation.

Finally, the costs of protracted antitrust litigation will be borne entirely by the citizen-customers public power utilities serve. With private utilities, shareholders may bear the cost of litigation through reduced profits. Public power utilities have no shareholders; all of the costs of litigation will ultimately be shouldered by the citizen-customers they serve, whether through the rates they pay, reduced services and use of revenue for other public goals, or both.

CONCLUSION

The practical impact of putting off appeal of a state-action immunity denial until the end of trial court litigation will be to impose the risk of massive litigation costs on public power utilities, with the potential to deter and distract their leaders. Public power utilities are governmental entities that serve important public purposes, and they provide critical public services to the communities that they serve. The Court should reverse the Ninth Circuit's decision and permit interlocutory appeal by a public entity of a decision to deny state action immunity before trial. Such a ruling would advance the principles underlying the Court's establishment of state-action immunity, and would reasonably apply those principles to public

power utilities providing essential services to millions of Americans nationwide.

Respectfully submitted,

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